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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Jose Sarinana,

13 Defendant.
14

No. CR-25-00865-001-PHX-DWL

ORDER

15 Defendant Jose Sarinana has filed three *ex parte* applications for a Rule 17(c)
16 subpoena (Docs. 18, 20, 22), as well as motions to seal each application (Docs. 17, 19, 21).

17 1. *Ex Parte* Nature Of Applications

18 Although “[t]here is no general consensus among courts, and no authority binding
19 on this Court, as to whether applications for Rule 17(c) subpoenas may be filed *ex parte*,”
20 many courts have approved this practice. *United States v. Clason*, 2007 WL 1259138, *1
21 (D. Ariz. 2007). *See also United States v. Sleugh*, 896 F.3d 1007, 1010 (9th Cir. 2018)
22 (“Criminal defendants sometimes seek to obtain evidence by filing applications asking the
23 court to issue subpoenas for the production of documents or witnesses pursuant to Federal
24 Rule of Criminal Procedure 17(c). These applications, supported by an attorney’s affidavit
25 explaining the reasons the evidence is necessary, are often filed *ex parte* and under seal.”);
26 *United States v. Beckford*, 964 F. Supp. 1010, 1027 (E.D. Va. 1997) (“[T]he Sixth
27 Amendment supplies justification for interpreting Rule 17(c) to permit *ex parte* procedures
28 respecting the issuance of pre-trial subpoenas duces tecum . . .”).

1 The Court agrees with those decisions, which recognize that proceeding in an *ex*
 2 *parte* fashion is only “appropriate in those rare situations where mere disclosure of the
 3 application for a pre-trial subpoena would: (i) divulge trial strategy, witness lists or attorney
 4 work-product; (ii) imperil the source or integrity of subpoenaed evidence; or (iii)
 5 undermine a fundamental privacy or constitutional interest of the defendant.” *Clason*, 2007
 6 WL 1259138 at *2 (cleaned up). *See also Beckford*, 964 F. Supp. at 1030-31 (“In most
 7 instances, it will not be necessary to disclose trial strategy, divulge witnesses or work
 8 product, or implicate a privacy right merely to make the application for issuance of a pre-
 9 trial subpoena duces tecum. And, a party seeking to proceed *ex parte* will have to meet a
 10 heavy burden to proceed in that fashion. . . . [E]*x parte* applications will be filed rarely
 11 and likely will be granted less frequently.”).

12 Defendant contends he should be allowed to proceed in an *ex parte* fashion because
 13 “the information provided in [each] application necessarily contains the work product of
 14 the defense counsel and discloses defense strategy.” (Doc. 18 at 2; Doc. 20 at 2; Doc. 22
 15 at 2.) Although it is not obvious why this is so—Defendant’s explanations on this point
 16 are undeveloped and conclusory—the Court is willing to give Defendant the benefit of the
 17 doubt. *See, e.g., Clason*, 2007 WL 1259138 at *2 (“The Court has reviewed Defendant’s
 18 *ex parte* application and concludes that allowing the Government to view the application
 19 would divulge Defendant’s trial strategy, possibly infringing his constitutional rights. The
 20 Court will allow the application to be filed *ex parte*.”); *United States v. Harbour*, 2021 WL
 21 1293280, *1 (D. Ariz. 2021) (“Defendant has established that preserving the sealed and *ex*
 22 *parte* nature of his Rule 17(c) motion—within which he has risked divulging trial tactics
 23 in order to meet his burden of demonstrating that the [*United States v. Nixon*, 418 U.S. 683
 24 (1974)] standards are satisfied—is necessary to prevent Defendant’s trial strategy from
 25 being revealed to the government. Consequently, the Court will grant Defendant’s
 26 motions.”) (citations omitted). *But see United States v. Fulton*, 2013 WL 4609502, *2
 27 (D.N.J. 2013) (“The Court has reviewed Defendant’s application and concludes that he has
 28 not demonstrated that this case presents any of the exceptional circumstances which would

1 warrant proceeding to obtain a subpoena duces tecum under Rule 17(c) in an *ex parte*
2 fashion. Fulton states that the nature of the requests may compromise defense strategy but
3 fails to explain how providing the Government with notice of the materials to be produced
4 pretrial or of the target of the Rule 17(c) subpoena will threaten to disclose that strategy to
5 the Government. He has not carried his burden to show that this case or particular subpoena
6 application presents the rare situation in which the disfavored *ex parte* process should be
7 allowed.”). Accordingly, the Court will allow the applications to be filed under seal and
8 *ex parte*.

9 2. Merits

10 “To ensure that Rule 17(c) is used narrowly, the Supreme Court devised a standard
11 regarding the pretrial production of evidence pursuant to Rule 17(c). Such production is
12 appropriate only when the moving party can show (1) that the documents are evidentiary
13 and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by
14 exercise of due diligence; (3) that the party cannot properly prepare for trial without such
15 production and inspection in advance of trial and that the failure to obtain such inspection
16 may tend unreasonably to delay the trial; and (4) that the application is made in good faith
17 and is not intended as a general fishing expedition. In other words, the requesting party
18 must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity.” *Clason*, 2007
19 WL 1259138 at *1 (cleaned up).

20 Defendant has cleared those three hurdles here—the requested materials are
21 relevant, will likely be admissible at trial, and are being sought with specificity.

22 3. Recipient

23 In each proposed subpoena, the “Place” of compliance is identified as the Federal
24 Public Defender’s Office in Phoenix. (Doc. 18-2 at 1; Doc. 20-2 at 1; Doc. 22-2 at 1.)
25 Each proposed subpoena also includes the following text in a later portion of the form that
26 appears immediately below the contact information for Defendant’s counsel: “Your
27 appearance in Court is not required if certified copies of the documents, electronically
28 stored are received in the FPD Office on or before [the compliance date].” (*Id.*

1 [capitalization omitted].) Likewise, in the “Additional information regarding attempted
 2 service, etc.” box on the second page of each proposed subpoena, the following text
 3 appears: “Your appearance in Court is not required if certified copies of the following
 4 documents, electronically stored information or objects, and/or records requested in the
 5 subpoena are received in the Office of the Federal Public Defender on or before [the
 6 compliance date].” (Doc. 18-2 at 2; Doc. 20-2 at 2; Doc. 22-2 at 2 [capitalization omitted].)

7 This approach is impermissible. Rule 17(c)(1) contemplates that compliance will
 8 be provided to the court: “The court may direct the witness to produce the designated items
 9 *in court* before trial or before they are to be offered in evidence.” *Id.* (emphasis added).
 10 Thus, courts have held that a Rule 17(c) subpoena should not direct the recipient to produce
 11 records directly to the requesting party. *See, e.g., United States v. Al-Amin*, 2013 WL
 12 3865079, *10 (E.D. Tenn. 2013) (“There is no provision in [Rule 17(c)] for the parties to
 13 receive records. The records should not have been provided to counsel, and counsel should
 14 not have accepted them but rather if the subpoena had been proper they would have been
 15 in the custody and control of the Court and both parties may have been permitted to inspect
 16 the records.”); *United States v. Latimore*, 2010 WL 148231, *3 (E.D. Mich. 2010)
 17 (“Defendant Gilford has not established that he is entitled to have the documents delivered
 18 directly to defense counsel.”); *United States v. Jenkins*, 895 F. Supp. 1389, 1394 (D. Hawaii
 19 1995) (“It appears to the court that Castle delivered the documents directly to counsel for
 20 the Defendant. Indeed, Defendant’s application for the [Rule 17(c)] subpoenas *duces*
 21 *tecum* makes a request for subpoenas requiring ‘the documents to be turned over directly
 22 to the defense at the earliest possible date.’ The magistrate erred in allowing the documents
 23 to be turned over directly to the defense and not to the court.”). However, a court need not
 24 deny a request for a Rule 17(c) subpoena on this basis—instead, the court can simply
 25 modify the proposed subpoena to require production to the court rather than to the
 26 requesting party’s counsel. *See, e.g., United States v. Turner*, 2025 WL 1062511, *4 (W.D.
 27 Va. 2025) (“Related to the access issue is the question of where responsive materials should
 28 be sent. Without divulging the substance of the proposed subpoenas, the Court notes that

1 the Defendant has proposed requiring that materials be produced to the Federal Public
 2 Defender's Office in Charlottesville. However, Rule 17(c) requires that the materials be
 3 sent to the Court. Accordingly, the subpoenas shall list the Court Clerk's Office in
 4 Charlottesville as the place where responsive materials be produced."); *United States v.*
 5 *Subil*, 2023 WL 7334168, *2 (W.D. Wash. 2023) ("The Court agrees that issuance of a
 6 subpoena is proper . . . [but] Mr. Subil has not demonstrated that he is entitled to have the
 7 documents delivered directly to defense counsel. Rule 17(c)(1) states that a court may
 8 direct the production of materials 'in court,' not another location. Therefore, Mr. Subil's
 9 proposed subpoena will be modified to reflect this Court as the place of compliance.")
 10 (citations omitted); *United States v. Shelley*, 2017 WL 3470940, *4 (W.D. Okla. 2017)
 11 ("Defendant has not established that he is entitled to have the documents delivered directly
 12 to defense counsel. Accordingly, the Court will require modification of the subpoena to
 13 direct that any production be made to the Clerk of Court to receive the documents and hold
 14 them for inspection."). The Court will follow that approach here.

15 In a related vein, Rule 17(c)(1) provides that "[w]hen the items arrive, the court may
 16 permit the parties and their attorneys to inspect all or part of them." On the one hand, the
 17 permissive nature of this standard—"may permit"—suggests there may be instances where
 18 it would be appropriate for subpoenaed materials to be shared only with the requesting
 19 party. *Beckford*, 964 F. Supp. at 1029 ("[U]pon a proper showing, the court could exercise
 20 its discretion under Rule 17(c) to permit pre-trial inspection by only the requesting party.").
 21 On the other hand, Defendant has not explained why that disfavored approach is warranted
 22 here. *See, e.g., Turner*, 2025 WL 1062511 at *4 ("General principles of fairness suggest
 23 that even though an *ex parte* process may be necessary for a party to seek a Rule 17
 24 subpoena under certain circumstances, it does not follow that the defendant is entitled to
 25 strategic advantage or tactical surprise. Here, the Government shall be allowed to inspect
 26 the documents to avoid providing the Defendant an unfair advantage. . . . When the items
 27 arrive [at the Clerk's office], the court may permit the parties and their attorneys to inspect
 28 all or part of them.") (cleaned up); *Harbour*, 2021 WL 1293280 at *1 ("[E]ven where the

1 Court has allowed a defendant to file an application for subpoena duces tecum that is *ex*
 2 *parte*, once the application is granted, as here, it does not follow that the defendant is
 3 entitled to strategic advantage or tactical surprise. . . . Consequently, although the Court
 4 will permit Defendant’s Rule 17(c) motion to remain *ex parte* and under seal to prevent the
 5 disclosure of his trial strategy to the government, it will direct that the government have
 6 access to the responsive material, itself, once it is produced by the third parties.”); *United*
 7 *States v. Sellers*, 275 F.R.D. 620, 625 (D. Nev. 2011) (“The court finds [the] application
 8 . . . establishes good cause for production of the requested photographs prior to trial. The
 9 court also finds [the] application and supporting affidavit were appropriately filed *ex parte*
 10 and should remain sealed to protect the mental impressions and trial strategy of defense
 11 counsel. However, . . . the court will direct the witness to produce the designated items to
 12 the Clerk of Court, who shall inform both the government and defense counsel when the
 13 photographs are available, permitting counsel for both sides to inspect them as
 14 contemplated by Rule 17(c)(1).”).¹

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21 ¹ Although some courts have concluded that “where both parties will have pre-trial
 22 access to the subpoenaed documents, it would be entirely unnecessary to have an *ex parte*
 23 proceeding,” *Beckford*, 964 F. Supp. at 1029 n.27 (citing cases), the Court respectfully
 24 disagrees for the reasons explained in earlier portions of this order. The *ex parte* procedure
 25 is permissible here is because Defendant’s applications include an explanation of why the
 26 requested subpoenas satisfy the *Nixon* standard—an explanation Defendant wishes to
 27 conceal from the government because it may reveal Defendant’s trial strategy. But
 28 providing the government with access to the actual materials being sought in the subpoenas
 will not impermissibly reveal Defendant’s trial strategy. *Turner*, 2025 WL 1062511 at *4
 (“[T]he Government shall be allowed to inspect the documents to avoid providing the
 Defendant an unfair advantage. Still, to protect the confidentiality of the Defendant’s trial
 strategy, the underlying Rule 17(c) motion and supplemental filing will remain docketed
 under seal and *ex parte*.”); *Harbour*, 2021 WL 1293280 at *1 (“[A]lthough the Court will
 permit Defendant’s Rule 17(c) motion to remain *ex parte* and under seal to prevent the
 disclosure of his trial strategy to the government, it will direct that the government have
 access to the responsive material, itself, once it is produced by the third parties.”).

1 Accordingly,

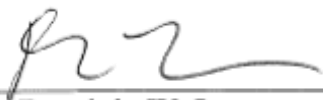
2 **IT IS ORDERED** that:

3 1. Defendant's *ex parte* motions to seal (Docs. 17, 19, 21) are **granted**.

4 2. Defendant's *ex parte* applications (Docs. 18, 20, 22) are **granted in part and**
5 **denied in part**. The Clerk shall issue Defendant's proposed subpoenas (Docs. 18-2, 20-2,
6 22-2) after making the following modifications: (1) the subpoenas shall list the Clerk's
7 Office in Phoenix, rather than the Federal Public Defender's Office, as the "Place" where
8 responsive materials shall be produced; (2) the subpoenas shall omit the verbiage, which
9 appears in all-capitalized text in two places in the proposed subpoenas, stating that
10 "appearance in court is not required if certified copies . . . are received in the Federal Public
11 Defender's Office"; and (3) the subpoenas shall list the "Date and Time" of compliance as
12 two weeks from the date of issuance, rather than the originally proposed deadline of
13 "7/22/2025 9:00 a.m."

14 3. If and when responsive materials arrive, the Clerk shall notify the parties that
15 the materials are ready for their inspection.

16 Dated this 15th day of July, 2025.

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19 _____
20 Dominic W. Lanza
21 United States District Judge
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